BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The opinion of the district court is reported, 44 F. Supp. 660, and is in the record, R. 42.

The opinion of the second circuit court of appeals is reported, 132 F. 2d 408, and is in the record, R. 59.

JURISDICTION

The date of the judgment to be reviewed is December 31, 1942, (R. 65).

The judgment was rendered in a civil action brought under the patent statutes to determine the issues of validity and infringement of a patent.

The statute under which jurisdiction is invoked is Judicial Code 240(a), 28 U. S. C. A. 347, as amended by the Act of February 13, 1925.

Cases believed to sustain the jurisdiction are:

Sinclair Refining Co. v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, certiorari being granted to decide the scope of discovery in aid of a suit for specific performance of an invention contract (p. 692); *Duplate Corp.* v. *Triplex Safety Glass Co.*, 298 U. S. 448, certiorari being granted "To settle important questions as to the liability of infringers" (p. 452); *Neirbo* v. *Bethlehem*, 308 U. S. 165, certiorari being granted as to a venue question, "because of the uncertainties in application of Sec. 51, emphasized

by conflict" (p. 167); *Sheldon, et al.* v. *Metro-Goldwyn Pictures,* 309 U. S. 390, to settle a question "which appears to be one of first impression in the application of the copyright law" (pp. 396, 397); *Sampsell* v. *Imperial Paper,* 313 U. S. 215, certiorari being granted "because of the importance in administration of the Bankruptcy Act of the questions raised" (p. 217); and *Mishawaka* v. *S. S. Kresge,* 316 U. S. 203 (May 4, 1942) "Deeming the matter to present an important question under the Trademark Act, we brought the case here" (p. 204).

STATEMENT OF THE CASE

The facts are sufficiently stated in the petition.

SPECIFICATION OF ERRORS

The errors which petitioner will urge, if the petition for writ of certiorari be granted, are that the Circuit Court of Appeals for the Second Circuit erred:

1. In deciding that the Association, although it had several principal places of business in different districts, was suable as "an inhabitant" under the patent venue statute, Judicial Code, Sec. 48, in only the one district which was its most principal place of business.

2. In failing to hold that the Association was so suable in the southern district of New York, where it had a principal place of business, and a member was resident, as well as a director, who was also a member of the executive committee of the Association.

3. In failing to hold that the members of the Association were liable to suit in a class action, in the southern dis-

trict of New York, where resided a member railroad and a director who was also a member of its executive committee.

SUMMARY OF ARGUMENT

The points of argument follow the reasons relied upon for the grant of a writ of certiorari and are stated in the petition and the index. For the sake of brevity, they are omitted at this point.

ARGUMENT

POINT I

THE ASSOCIATION IS SUABLE AS AN ENTITY.

An unincorporated association is suable as an entity in its common name to enforce a federal substantive right, *United Mine Workers of America* v. *Coronado Coal Co., et al.*, 259 U. S. 344; *Moore Fed. Prac.*, Vol. 2, p. 2098; *Dogma and Practice in the law of Associations*, 42 Harv. L. Rev. 977, 1001. Rule 17(b) of the new federal equity rules provides:

> "(b) CAPACITY To Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued

> in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

The present case is to enforce patent rights, created by and existing under the Constitution and laws of the United States, and it is a suit of which the federal courts have exclusive jurisdiction, *Wade* v. *Lawder*, 165 U. S. 624; *New Marshall Engine Co.* v. *Marshall Engine Co.*, 223 U. S. 473.

POINT II

THE SOUTHERN DISTRICT COURT OF NEW YORK HAD VENUE OF THE ASSOCIATION.

Venue is a matter of the convenience of the litigants. It is very different from jurisdiction. The only questions involved here are those of venue, namely of the personal privileges of the Association and of its members to be sued in courts preferred by them. As said in *Neirbo* v. *Bethlehem Co.*, 308 U. S. 165, 167, 168:

> "The jurisdiction of the federal courts—their power to adjudicate — is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. *This basic difference between the court's power and the litigant's convenience is historic in the federal courts.*"

Apparently the present suit is the first one in which an unincorporated association or its members have raised the

question of venue. In the *Coronado* case, the suit was brought under the Sherman anti-trust laws to recover damages for alleged violations of those laws. The defendants were an international union, a district union, 27 local unions and individual members of the unions. The opinion of this Court and of the Eighth Circuit Court of Appeals, 258 F. 829, do not mention any question regarding venue. This Court said (259 U. S. 392) "for these reasons, we conclude that the International Union, the District No. 21 and the twenty-seven local unions were properly made parties defendant here and properly served by process on their principal officers".

The opinion of the district court in the present case (R. 46) relied upon the diversity of citizenship line of cases, such as *Levering & Garrigues Co.* v. *Morrin*, 2 Cir., 61 F. 2d 115, holding that in suits based upon diversity of citizenship, the jurisdiction of the court is determined by the citizenship of each of the members of an unincorporated association. Thus, if any member of the association is a citizen of the same state as the plaintiff, the court does not have jurisdiction. However, the second circuit court of appeals rightly pointed out that these decisions were not applicable to the present case, because they dealt with the jurisdiction of the subject matter of the suit, wherein the states had concurrent jurisdiction, the federal courts endeavoring to avoid any possible usurpation of jurisdiction in such cases. The present question is not one of jurisdiction, the federal courts having exclusive jurisdiction, but one of only venue (132 F. 2d 410, 411, R. 61).

The district court in its opinion (R. 45) also referred to *Sutherland, et al.* v. *U. S.*, 8 Cir. 74 F. 2d 89, where the United States brought suit in Nebraska against two part-

ners who were both inhabitants of Missouri, but who did business in Nebraska. The court held that the defendants had a right to be sued in Missouri, but plainly that holding is not pertinent here, because both the defendant partners were inhabitants of a single district. The circuit court of appeals opinion in the present case does not mention the *Sutherland* decision.

POINT III

THE MEMBERS OF THE ASSOCIATION WERE SUABLE IN A CLASS ACTION.

If the Association as an entity is not suable in the southern district of New York, the members are suable in a class action.

A class suit may be used to enforce a federal substantive right. *Gibbs* v. *Buck*, 307 U. S. 66 and *McDaniel* v. *Board of Public Instruction*, 39 F. Supp. 638 (D. C. Fla.), were class actions to enforce rights under the federal constitution, and *Independence Shares Co.* v. *Deckert*, 3 Cir., 108 F. 2d 51 and 123 F. 2d 979, and *Natl. Hairdressers, etc.* v. *Philad*, (D. C. Dela.), 34 F. Supp. 264 and 41 F. Supp. 701, 709, affirmed on opinion below, 3 Cir., 129 F. 2d 1020, were class actions to enforce federal statutory rights, the latter being a declaratory judgment suit involving patent infringement. In the present case, the federal substantive right complained of is infringement of the patent in suit by the Association, which, acting as the agent for its members, owns and operates a railroad car containing the infringing apparatus. It is plain that an unincorporated association is liable for the torts of its agents, *Coronado* decision.

The practice in class suits is well stated in R. C. P. Rule, 23(a), as follows:

> "(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, *one* or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> "(1) joint, or common, * * *;
>
> "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Only two questions are presented here under this Rule: (1) whether the persons constituting the class are so numerous as to make it impracticable to bring them all before the court; and (2) whether the two individual defendants, of which the court had venue, adequately represent all the members.

The Association includes about two hundred railroad companies among whose members are citizens and inhabitants of more than two-thirds of the states (complaint, R. 3). Only one member of the Association, namely the Long Island, is an inhabitant of the southern district, so that all the other members are inhabitants of other districts throughout the United States or in Canada. It is clear, therefore, that the members of the Association constitute a class so numerous and widely separated as to make it not merely impracticable, but impossible to bring all of them before any one court. This was not disputed and it seems to have been assumed by the court below (opinion, R. 46-48).

As to the second question, the Association's motion stated (R. 9):

> "3. There is no allegation of fact to show that the members and director named in the Complaint would fairly insure the adequate representation of the Association of American Railroads and all its members as a class."

Neither of the courts below passed on the question, and it is without merit. The complaint alleges in paragraph 4 (R. 5) that the defendants "fairly insure the adequate representation of the joint and common interests herein of defendant Association and of all its members as a class". Even this allegation was unnecessary under R. C. P. Rule 9(a) which provides—

> "(a) CAPACITY. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

The Association made no "specific negative averment" including "such supporting particulars as are peculiarly within the pleader's knowledge," which would be necessary to raise the issue of the capacity of Williamson and the Long Island to be sued in their representative ca-

pacities. Rule 23(a) makes clear that even one representative is sufficient, by providing that "*one* or more" members of a class may represent all, *National Hairdressers' & Cosmetologists' Ass'n.* v. *Philad Co.* (D. Dela.), 34 F. Supp. 264, 266 and 41 F. Supp. 701, 708.

The present suit is maintainable as a class action, if it should be held that the southern district court does not have venue of the Association as an entity under Section 48 of the Judicial Code.

The judgment below places unincorporated associations in a preferred position as to liability for patent infringement, which obviously was not intended by Congress and which is an unfair discrimination.

The petition for writ of certiorari should be granted and the judgment of the Second Circuit Court of Appeals reversed.

Respectfully submitted,

STEPHEN H. PHILBIN.

JOHN B. CUNINGHAM,
JOSEPH H. LIPSCHUTZ,
Of Counsel.

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